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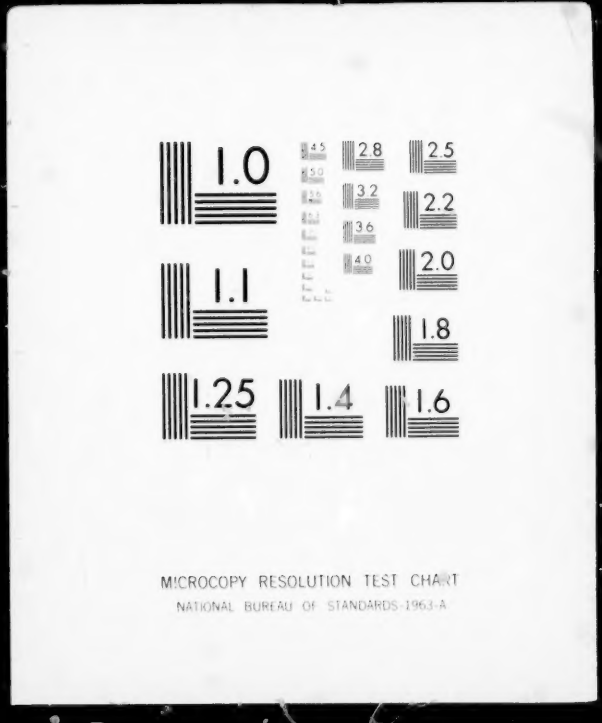

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ABSTRACT

This report considers two 1972 Supreme Court decisions (Roth and Sindermann) concerning nonrenewal of contracts of nontenured teachers. At issue are the interpretations of the First and Fourteenth Amendments as they apply to violation of free speech and deprivation of alleged interests of "property" or "liberty." Reactions of the education and legal communities to the two decisions are examined as well as subsequent cases involving contract renewal. Possible alternatives to the bare nonrenewal of contracts without a statement of reasons are considered. The complete Supreme Court decisions are included in the appendix. (MJM)

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Carol Herrnstadt Shulman

1973

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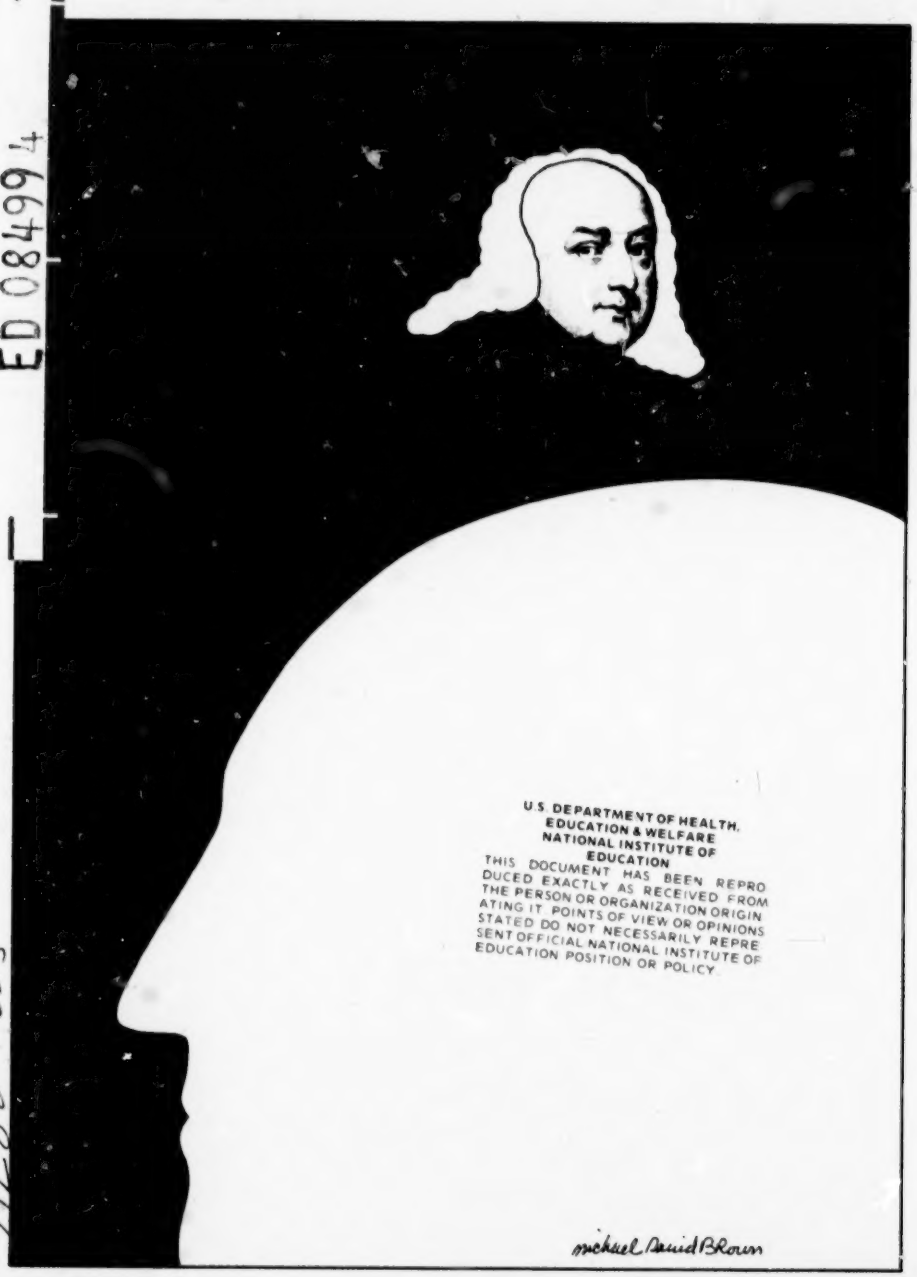

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Employment of Nontenured Faculty: Some Implications of *Roth* and *Sindermann*

Carol Herrnstadt Shulman

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Foreword

This report considers two 1972 Supreme Court decisions (*Roth* and *Sindermann*) concerning nonrenewal of contracts of nontenured teachers. At issue are the interpretations of the First and Fourteenth Amendments as they apply to violation of free speech and deprivation of alleged interests of "property" or "liberty." Reactions of the educational and legal communities to the two decisions are examined as well as subsequent cases involving contract nonrenewal. Possible alternatives to the bare nonrenewal of contracts without a statement of reasons are considered. The author, Carol Herrnstadt Shulman, is a Research Associate at the ERIC Clearinghouse on Higher Education. This paper will also be published in the *Denver Law Journal* in the Spring 1974 issue.

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Introduction

In concurrent 1972 decisions authored by Justice Potter Stewart, the Supreme Court examined the right of nontenured teachers in public institutions to a statement of reasons and collegiate due process hearings prior to nonrenewal of their contracts. *Board of Regents, Et Al. v. Roth*[1] and *Perry v. Sindermann*[2] came before the Court at a time when there was considerable conflict among the circuit courts of appeals concerning the rights to be accorded to such teachers.[3] The cases presented the Supreme Court with the major issues in this range of litigation: specifically, claims that the Fourteenth Amendment[4] entitled teachers to institutional due process hearings prior to contract nonrenewal, and claims that nonrenewal might be an infringement of free speech interests under the First Amendment.

In general, the Court found in *Roth* and *Sindermann* that nontenured teachers[5] are entitled to due process protection[6] only under limited conditions: (1) deprivation of proven interests of "property" or "liberty" as those concepts have been interpreted under the Fourteenth Amendment; or (2) after an institution has directly violated a teacher's First Amendment free speech interests.

This monograph will examine the educational and legal com-

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1 408 U. S. 564 (1972).

2 408 U. S. 593 (1972).

3 See, *Jones v. Hopper*, 410 F. 2d 1323 (10th Cir. 1969), *cert. denied*, 397 U. S. 991 (1970); *Freeman v. Gould Special School Dist. of Lincoln County, Ark.*, 405 F. 2d 1153 (8th Cir. 1969), *cert. denied*, 396 U. S. 843 (1969); *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970).

4 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

5 A tenure system provides that "After the expiration of a probationary period, teachers, or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies." "Academic Freedom and Tenure, 1940 Statement of Principles and 1970 Interpretive Comments," *AAUP Policy Documents and Reports*. Washington, D. C.: American Association of University Professors, 1973.

6 "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Rochin v. California*, 342 U.S. 165, 169, citing *Snyder v. Massachusetts*, 291 U.S. 97. The central meaning of procedural due process is that, "parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), citing *Baldwin v. Hale*, 68 U.S. 223.

munities' reactions to *Roth* and *Sindermann*, various interpretations of the decisions, and subsequent cases involving contract nonrenewal. It will also describe possible alternatives to the bare nonrenewal of contracts without a statement of reasons.

Board of Regents of State Colleges, Et Al. v. Roth

David Roth was employed under a one-year contract for academic year 1968-69 as an assistant professor at Wisconsin State University-Oshkosh. He did not have tenure, which is granted under Wisconsin statutes only after four years of continuous service. Without a statement of reasons, Roth was notified in January 1969 that his contract would not be renewed for the next academic year. This notification followed a period of conflict on campus, during which Roth had openly criticized the university administration. His suit in federal district court claimed[7] that his free speech and due process rights under the Fourteenth Amendment had been violated because (1) his public views were the reasons his contract was not renewed, and (2) in any case, he was entitled to an institutional hearing before a final decision on his contract was made. The district court agreed with the latter contention (310 F. Supp. at 983), and granted summary judgment ordering the university to provide Roth with a statement of reasons and to set a mutually agreeable date for a hearing (310 F. Supp. at 984). The court of appeals upheld this decision.[8] In its review of *Roth*, the Supreme Court addressed itself only to Roth's due process rights under the Fourteenth Amendment, and did not consider the free speech aspects of the case, in regard to which the district court deemed summary judgment[9] inappropriate since the facts surrounding the alleged interference with Roth's freedom of speech would have to be developed at trial.

The Supreme Court approached the case differently from the district court and the court of appeals. The lower courts were concerned with weighing the plaintiff's interest in securing his job, as opposed to the institution's need for unfettered discretion in its employment practices. The Court asserted that this weighing process must come only after it has been determined that there is either a "liberty" or "property" interest under the Fourteenth Amendment.

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[7] *Roth v. The Board of Regents of State Colleges and Roger E. Guiles*, 310 F. Supp. 972, at 974 (W.D. Wis., 1970).

[8] *Roth v. The Board of Regents of State Colleges and Roger E. Guiles*, 446 F. 2d 606 (7th Cir. 1970).

[9] Summary judgment is granted where there are no material facts in the controversy that need to be litigated and where the party asking for summary judgment is entitled to judgment as a matter of law.

Therefore, the Court examined the circumstances surrounding Roth's initial employment and contract nonrenewal for the existence of such interests.

On the question of "liberty," the Court recognized that term as meaning "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men" (408 U.S. at 572.)* The Court found that if a teacher's "liberty" under this interpretation had been impaired, he would be entitled to a due process hearing. Examples given by the Supreme Court of circumstances that would impair a teacher's "liberty" when his contract is not renewed included: (1) an accusation that "might seriously damage his standing and associations in his community; and (2) nonrenewal that "impose[s] on [the teacher] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities" (408 U.S. at 573).

The Court noted that while the district court and the court of appeals deemed nonretention itself to have a "substantial adverse effect" on a teacher, it found nothing in the record to support this belief. Therefore, the Court held that there was nothing in Roth's case to show that his "liberty" has been impaired (408 U.S. at 574, n. 13).

Reviewing decisions on property interests, the Court announced a standard to be used in determining the existence of a property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it (408 U.S. at 577).

The Court found (408 U.S. at 577) such a claim emerges from the "rules or understandings" issued by an independent source, such as a state government. In Roth's case, a property interest would have to be developed from the terms of his employment and/or the state statutes relating to granting tenure at public institutions. Roth's appointment, however, did not provide for employment beyond June 30, 1969, nor was there any renewal provision in his teaching contract. Despite Roth's observation that Wisconsin State University-Oshkosh generally rehires teachers on one-year contracts, the Court

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* All page citations of the Court's decisions in *Roth* and *Sindermann* refer to the original page numbers of the official reports reprinted in the appendix. These page numbers are shown in brackets in the appendix.

noted that the district court had not found any "common law" of reemployment (408 U.S. at 578, n. 16). Therefore, the University's practice did not create the sort of expectation of renewal that would require a statement of reasons and a hearing on nonrenewal. State statutes also did not establish any right to reemployment for Roth. Given these considerations, the Court found that Roth did not have a "sufficient" (408 U.S. at 578) property interest to entitle him to a statement of reasons and a hearing. Accordingly, the Court reversed and remanded the case for further proceedings consistent with the Court's decision.

In its conclusion, the Court observed:

> Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities (408 U.S. at 578-79).

Perry v. Sindermann

Sindermann presented the Court with a claim of free speech violations under the First and Fourteenth Amendments, as well as a charge that he was entitled to Fourteenth Amendment procedural due process. The Court also had to deal with a substantially different set of circumstances in *Sindermann,* and its judgment was more favorable to the teacher than in *Roth.*

Sindermann had been employed at Odessa Junior College in Odessa, Texas, from 1965 through June 1969 under a series of one-year contracts. Odessa had no tenure system at that time.[10] He had previously worked for six years in Texas' state college system. During the 1968-69 academic year, Sindermann testified before committees of the Texas legislature in his role as president of the Texas Junior College Teachers Association. He favored changing Odessa to a four-year institution, a position opposed by the college's Board of Regents. Sindermann was notified in May 1969 that his contract would not be renewed, and the Board of Regents issued a press release setting forth allegations of Sindermann's insubordination. Despite its public stance, the Board would not provide Sindermann with an official statement of reasons for nonrenewal or an opportunity for a hearing.

In federal district court, Sindermann claimed that his nonrenewal was based on his public criticism of the Board of Regents and that his nonrenewal therefore infringed upon his free speech rights. He also asserted that his Fourteenth Amendment right to procedural due process was violated by the college administration's refusal to provide a hearing. The district court's summary judgment for the college[11] was reversed on appeal, the court of appeals[12] holding that a full hearing on the contested facts was necessary. It further held that despite Sindermann's nontenured status, his contract nonrenewal would be impermissible if it violated his constitutionally-protected free speech rights.

The Supreme Court agreed with the court of appeals that the district court had to investigate the facts of Sindermann's claim that his

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10 This situation has changed, see p. 13.

11 *Robert P. Sindermann v. Charles R. Perry, Et Al.,* U. S. District Court for the Western District of Texas, Midland-Odessa Division, No. MO-69-CA34, August 4, 1969 (unreported).

12 *Sindermann v. Perry,* 430 F. 2d 939 (5th Cir. 1970).

free speech rights had been violated. The Court declared it is a well established principle of constitutional law that

> [A government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech (408 U.S. at 597).

On the issue of Sindermann's right to a due process hearing, the Court held that he must be given the opportunity to demonstrate that he had a property interest in continued employment, despite the absence of a formal tenure policy at Odessa. It found that Sindermann's allegations based on factors such as his years of service in the Texas system and the policies and practices of Odessa Junior College (408 U.S. at 599-601) might be sufficient for him to prove a property interest.

In this regard, Sindermann had claimed that he had a form of job tenure because the guidelines of the Coordinating Board of the Texas College and University System provided for tenure after seven years of service in higher education institutions (Sindermann had ten years). In addition, Odessa's faculty handbook declared:

> Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as he displays a cooperative attitude toward his co-workers and his supervisors, and as long as he is happy in his work (408 U.S. at 600).

The Court therefore found that Sindermann raised tenable claims to a property interest in continued employment. It noted:

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing (408 U.S. at 601).

In Sindermann's case, the Court declared that "he must be given an opportunity to prove the legitimacy of his claim of [property] entitlement in light of the policies and practices of the institution" (408 U.S. at 608). Such proof would require the college to grant him a hearing at which he would be given the reasons for his non-retention and would be able to "challenge their sufficiency" (408 U.S. at 603).

Implications of the Court's Interpretations of "Liberty"

In light of *Roth* and *Sindermann*, courts have considered it important to determine what constitutes a stigma severe enough to be considered a deprivation of liberty in cases of contract nonrenewal. The history of *Roth* shows there is no settled answer to this question yet.

Both the district court and the court of appeals in *Roth* noted that nonretention is a serious impediment in a college teacher's career (310 F. Supp. at 970; 446 F. 2d at 809). But in *Roth*, the Supreme Court stated:

> . . . on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another (408 U.S. at 575).

Disagreeing with the majority opinion, Justice Douglas noted in his *Roth* dissent:

> Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State (408 U.S. at 585).

Professor William Van Alstyne of Duke University Law School, a distinguished commentator on matters concerning higher education, also observes that the majority opinion in *Roth* fails to recognize the stigma of nonrenewal by treating Roth as if he had only a special, one-year, limited appointment.

> By placing Professor Roth in this different frame, as though he were not a regular appointee and as though there were no significant distinction between his situation and that of a special one-year terminal appointment, the majority of the Supreme Court reduced his constitutionally cognizable substantive interests in reappointment to zero.[14]

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14 "The Supreme Court Speaks to the Untenured: A Comment on *Board of Regents v. Roth* and *Perry v. Sindermann*," *AAUP Bulletin* Vol. 58, No. 3, September, 1972, p. 268. (Professor Van Alstyne is a former chairman of the American Association of University Professors' Committee on Academic Freedom and Tenure.)

For additional commentary on the employment obstacles associated with contract

Laurence H. Kallen, *supra*, n. 14, at p. 467, notes the Court's statement:

> Mere proof, for example, that his [Roth's] record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty (citing 408 U.S. at 475, n. 13).

but asks (p. 467):

> . . . what does this say about the teacher who is given notice of nonrenewal in January and by May has one hundred rejections to applications for employment?

These commentaries demonstrate the manner in which the *Roth* decision may seriously impair the careers of probationary college teachers.

Cases decided after *Roth* that examine the Fourteenth Amendment question considered in that decision[15] have not clearly settled the issue of the extent to which difficulty in reemployment constitutes a deprivation of "liberty."

In *Lipp, supra*, n. 15, the Seventh U.S. Circuit Court of Appeals found that an elementary school substitute teacher was not deprived of "liberty" when he was characterized as "anti-establishment" in a generally satisfactory efficiency rating, since the court did not consider the "anti-establishment" comment sufficient to damage the teacher's reputation so as to constitute a deprivation of liberty. Further, the court of appeals found that the comment did not prevent him from obtaining other employment in the school system (470 F. 2d at 805). In any event, the court of appeals noted, "not every negative effect upon one's attractiveness to future employers violates due process if it results without a hearing" (*Ibid*).

But in another 1972 decision, *Wilderman, supra*, n. 15, the Eighth

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nonrenewal see Kallen, Laurence H., "The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?" *Illinois Bar Journal*, May 1973; Levinson, Marc A., "The Fourteenth Amendment, Fundamental Fairness, the Probationary Instructor, and the University of California—An Incompatible Foursome?" 5 *Davis (U. Cal.) Law Review* 508; N. Carson Stogner, Jr., "Constitutional Law—The Rights of the Untenured Teacher to Procedural Due Process Prior to Dismissal—*Roth v. Board of Regents*, 408 U.S. 564 (1972), 7 *Richmond Law Review* 357.

15 *Johnson v. Fraley*, 470 F. 2d 179 (4th Cir. 1972); *McDowell v. Texas*, 465 F. 2d 1342 (5th Cir., 1972); *Lipp v. Board of Education of the City of Chicago*, 470 F. 2d 802 (7th Cir., 1972); *Wilderman v. Nelson*, 467 F. 2d (8th Cir., 1972); *Hostrop v. Board of Junior College District*, 377 F. Supp. 977 (1972); *Wellner v. Minnesota State Junior College Board*, D. Minn., No. 4-71 Civil 555, December 18, 1972 (unreported); *Franz v. Board of Education*, N.D. Ill., No. 772 C 151, August 10, 1972 (unreported).

U.S. Circuit Court of Appeals reviewed a case involving a welfare worker that imposed a greater stigma upon the plaintiff-employee, and the court accordingly found there was evidence "tending to show state action imposing a stigma upon Wilderman which may affect his future employment opportunities" (467 F. 2d at 1176). Employee Wilderman was discharged and his letter of dismissal, which cited his unfavorable attitude, was filed in several state offices. Also, a reference letter to a prospective employer "commented adversely upon the [plaintiff's] ability willingly to carry out his employer's policies" (*Ibid*). The court found that the district court "was not justified in summarily dismissing Wilderman's complaint insofar as it alleged a right to a pretermination hearing" (*Ibid*).[16]

The employment histories in two other recent cases of teacher contract nonrenewal point out additional difficulties that teachers encounter upon nonretention (1) where no reasons are given, and (2) even where the teacher's position is vindicated in court.

In *Orr v. Trinter*,[17] a Columbus, Ohio, high school teacher (Orr) whose contract was not renewed and who was not given a statement of reasons, was unable to find a teaching position for the following year. His complaint in district court charged that Orr

> will continue throughout the remainder of his professional career to suffer the [stigma] of having his professional qualifications [impugned] by the present action of the [School Board] in refusing to renew his contract for unknown reasons, and will have his prospects of acquiring future teaching positions at other schools substantially impaired by the aforementioned actions of the Defendants.[18]

The district court agreed and found that Orr was entitled to a statement of reasons and a hearing (318 F. Supp. at 1046-47), but the court of appeals reversed the lower court (444 F. 2d 128), finding that the school board's interest in freedom to hire is not outweighed by the teacher's interest in learning the reasons for nonrenewal (444 F. 2d at 135).

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[16] The district court had granted summary judgment for the defendants. See *Wilderman v. Nelson*, 335 F. Supp. 1381 (E.D. Mo. 1971).

[17] 318 F. Supp. 1041 (S.D. Ohio. E.D. 1970), 444 F. 2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), 409 U.S. 898 (1972). Two petitions for certiorari were filed. The first petition, submitted before the *Roth* and *Sindermann* decisions were handed down, raised the issue of whether Orr was entitled to a statement of reasons and procedural due process before nonrenewal. The second petition, submitted after the Court's decisions in *Roth* and *Sindermann* and after Orr's first petition was denied, raised the issue of First Amendment violations, which was present in the original complaints but not examined by the district court.

[18] *Orr v. Trinter, Et Al.*, Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, U.S. Supreme Court No. 71-249, p. 5.

Another school teacher also found that she was not able to find employment in her profession after her contract was not renewed. Mrs. Susan Russo, a high school art teacher in Henrietta, New York, did not have her contract renewed after her first year of teaching. The reason given for her nonrenewal was "insubordination." The court of appeals[19] found that this reason was invalid because "Mrs. Russo's dismissal resulted directly from her refusal to engage in the school's daily flag ceremonies" (469 F. 2d at 630). The court of appeals therefore reversed the lower court and remanded the case for proceedings not inconsistent with its opinion (469 F. 2d at 634). Despite this judicial finding, a highly satisfactory teacher observation report during her probationary year, and further scholastic achievement, Mrs. Russo has been unable to find work as an art teacher in and around Henrietta. She believes that work is available, but has found that the controversy surrounding her nonrenewal has proved an insurmountable obstacle to employment as an art teacher. She has been told as much in job interviews.[20]

An examination of *Roth* and *Sindermann* and the cases discussed above suggests that college administrations can minimize legal entanglements if they avoid interfering with the examples of "liberty" given by the Court in *Roth;* i.e., they should not impair a teacher's reputation in his community or attach such discredit to his nonrenewal that other job opportunities are foreclosed. Thus, college administrators may find that the best course, legally, is to say or publish nothing about a teacher whose appointment is not being renewed.[21]

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19 *Russo v. Central School District No. 1, Towns of Rush, Et Al., County of Monroe, State of New York,* 469 F. 2d 623 (2d Cir. 1972), *cert. denied,* ——— *U.S.* ———, 36 L. Ed. 2d 391 (1973).

20 Lang, Daniel, "A Reporter at Large: Love of Country." *The New Yorker,* July 30, 1973, p. 35.

21 James F. Clark, of Ela, Christianson, Esch, Hart & Clark (Wisconsin Association of School Board's legal counsel) in a letter to author dated July 10, 1973, notes that the Supreme Court decisions "appear to have resulted in some reluctance on the part of school officials to give reasons for nonrenewal." His view is corroborated by counsel for the Wisconsin Education Association, Bruce F. Ehlke, of Lawton & Cates, in a letter to author dated August 8, 1973. See also, Shannon, Thomas A., "Due Process for Nontenured Teachers from the Board's Viewpoint," *Frontiers of School Law,* Topeka, Kansas: National Organization on Legal Problems of Education, 1973. However, Mr. Clark has also informed the author that reasons for nonrenewal were given to some plaintiffs following the court of appeals' decision in *Roth* and, in turn, these plaintiffs have amended their complaints following *Roth* and *Sindermann,* to charge a deprivation of an interest in liberty without due process because the reasons given for their nonrenewal damage their professional reputations.

Implications of the Court's Interpretations of "Property"

The Supreme Court's view of the deprivation of property question in *Roth* and *Sindermann* suggests that it is in a school board's or college administration's best interest to be very explicit in its employment policy concerning yearly contracts and probationary teachers. This conclusion is evident from the Court's distinction between the *Roth* case, in which an explicit, structured tenure system was in effe and *Sindermann,* in which a *de facto* tenure system was alleged.

In *Roth,* the state statutes and the university regulations did not give rise to a legitimate expectation by Roth of continued employment as a probationary teacher. Professor Van Alstyne notes, however, that the Court made this finding in the absence of any evidence to the contrary in the record. He suggests that there may be situations in which,

> . . . on a better record, under more compelling circumstances, where the faculty member is well along the tenure track under policies explicitly encouraging reliance, peremptory notice of non-reappointment may not be enough to quench the constitutional claim to more specific consideration than none at all.[22]

Another writer[23] has suggested that institutions with tenure systems might avoid creating expectations of employment for probationary teachers by following Harvard's example: hire more probationary teachers than can be used to fill the available and expected tenure positions, and stress upon hiring them that tenure is only a "faint possibility." Since administrators at other institutions and teachers are aware of this competitive situation, Mr. Levinson believes that little stigma is attached to nonrenewal of untenured Harvard teachers' contracts, and that the same would hold true for other institutions that adopted similar hiring policies.

In contrast to institutions with explicit tenure systems that offer no objective expectancy of reemployment, institutions that use a contract system of employment may find that they have created such an expectancy in some circumstances. Federal courts, following *Roth* and *Sindermann,* have issued decisions for and against terminated

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22 Van Alstyne, *supra,* n. 14, at p. 270.

23 Levinson, *supra,* n. 14, at p. 619.

teachers previously employed under a succession of yearly contracts. In one case, the court found that a long period of employment under one-year contracts does not constitute *de facto* tenure [*Skidmore v. Shamrock Independent School District, Et Al.*, 464 F. 2d 605 (5th Cir. 1972)].[24] In this case, the Fifth U.S. Circuit Court of Appeals found that the complaint of a public school teacher who had been employed for 22 years on a series of one-year contracts, but whose contract was not renewed for the 23rd year, failed to state a claim upon which relief could be granted. The court further found that the teacher did not allege "the existence of rules or understandings promulgated or fostered by state officials which would justify any legitimate claim of entitlement of continued employment" (406 F. 2d at 606).

However, two other U.S. circuit courts of appeals have found that a series of one-year contracts may indicate a property interest in continued employment.[25] In *Johnson v. Fraley, supra,* n. 15, the court appeared to recognize what one author has called the "quasi tenure" situation acknowledged in the Supreme Court's decisions, i.e., official actions on the part of the institution that lead a teacher to expect continued employment despite the legal barrier of mere periodic contracts.[26]

These unpredictable results in contract nonrenewal cases may lead institutions without an explicit tenure system either to develop such a system or to adopt form contracts and an institutional policy that are very clear on the terms and conditions of employment. Such institutions may profit from Odessa College's unhappy example. Following the Supreme Court's decision in *Sindermann,* Odessa settled with Sindermann for $48,000 in back pay and court fees.[27] It has also, however, adopted a formal tenure policy to replace its contract system and its old statement of policy.[28]

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24 See also, *Lukac v. Acocks,* 466 F. 2d 577 (6th Cir. 1972).

25 *Johnson v. Fraley, supra,* n. 15; *Scheelhaase v. Woodbury Central Community School District, Et Al.,* 349 F. Supp. 986 (N.D. Iowa, N.D. 1972).

26 Van Alstyne, William, letter to author dated July 12, 1973.

27 Telephone conversation with Richard J. Clarkson, attorney for Robert Sindermann, Odessa, Texas, August 22, 1973.

28 "Policy Statement on Academic Freedom, Tenure, and Responsibility of Odessa College," adopted by the Board of Regents of Odessa College on March 27, 1972. In a court of appeals decision announced before *Sindermann,* a college that did not have a tenure system admitted that its nonrenewal of a contract was the equivalent of a termination and therefore required a showing of cause. The court found that an expectancy of employment had been created and the teacher was entitled to full tenure rights. *Ferguson v. Thomas,* 430 F. 2d 852 (5th Cir. 1970).

Implications of the Court's Commentary on the Free Speech Question

In *Sindermann*, the Court could not find that the teacher's nonrenewal was in reprisal for the exercise of his free speech rights, since the district court had granted summary judgment for Odessa College. The Supreme Court found, however, that

> [Sindermann's] allegations represent a bona fide constitutional claim. . . . For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper (408 U.S. at 598).

Thus, *Sindermann* does not directly speak to the question of pretermination proceedings on charges of free speech violations. But when *Sindermann* (408 U.S. at 499) is read with *Roth* (408 U.S. at 475), it is evident that direct violations of free speech rights would require such pretermination hearings. In *Sindermann*, the Court noted:

> The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. (Citation omitted.) We have rejected this approach in *Board of Regents v. Roth, ante* . . . (408 U.S. at 599, n. 5).

This reference in *Sindermann* is to an extensive footnote in *Roth*, which states, in part:

> In the respondent's case . . . the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's right of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest (408 U.S. at 575, n. 14).

One significant effect of *Roth* and *Sindermann* may be to inhibit the bringing of such First Amendment cases to court when contracts are not renewed. Roth's attorneys argued that if institutional proceedings were foreclosed to probationary teachers

> few professors, faced with non-retention decisions, will seek judicial relief. Litigation and the attendent public exposure may be costly both in terms

> of money and personal embarrassment. Moreover, without a statement of reasons, the professor has only two alternatives: quietly acquiesce in the non-retention or begin a major law suit based on his suspicion that the reasons behind the non-retention were constitutionally impermissible.[29]

Amici in support of Roth, the National Education Association, and Robert P. Sindermann, presented a similar argument about the "chilling effect" of litigation being the teacher's only alternative in a nonretention dispute.[30] Their comments are directed to an opposing amicus argument of the Commonwealth of Massachusetts that a teacher has an adequate remedy in nonrenewal cases under 42 U.S.C. § 1983.[31] The Commonwealth of Massachusetts appears to advocate this position, in the belief that institutional proceedings in every nonrenewal case would be more burdensome than court proceedings in selected cases only.[32]

Cases appearing since *Roth* and *Sindermann*[33] have demonstrated those decisions' significance as protection against the dismissal of free speech claims through summary judgments. In *Chitwood v. Feaster*, 468 F. 2d 357 (4th Cir. 1972), nontenured teachers at a state college charged that they were entitled to a statement of reasons, and that their contracts were not renewed because of their free speech activities. The court of appeals reversed a lower court decision that granted summary judgment for the college, finding that while the teachers were not entitled to a statement of reasons under *Roth*, their free speech claims, "although unsupported by hard evidence," must be heard (468 F. 2d at 361). The court of appeals noted:

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[29] Brief for the Respondent, p. 8, *Board of Regents of State Colleges and Roger E. Guiles v. David F. Roth*, No. 71-162 in the Supreme Court of the United States.

[30] Brief for the National Education Association and Robert P. Sindermann as Amici Curiae, p. 3, *Board of Regents of State Colleges and Roger E. Guiles v. David F. Roth, supra*, n. 29.

[31] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[32] Brief for the Commonwealth of Massachusetts as Amicus Curiae, p. 7, *Board of Regents of State Colleges and Roger E. Guiles v. David F. Roth, supra*, n. 29.

[33] *Chitwood v. Feaster*, 468 F. 2d 357 (4th Cir. 1972); *Duke v. North Texas State University*, 469 F. 2d 869 (5th Cir. 1973), *cert. denied*, ——— U.S. ——— 37 L. Ed. 2d 160; *Tygrett v. Washington*, 346 F. Supp. 1247 (D.D.C. 1972), *appeal docketed*, No. 72-1876, Sept. 19, 1972, U.S. Court of Appeals for the District of Columbia Circuit (argued July 12, 1973).

> The concurrence of protected speech, which may be unpopular with college officials, and the termination of the employment contract seem to be enough, in the view of the Supreme Court, to occasion inquiry to determine whether or not the failure to renew was in fact caused by the protected free speech *(Ibid).*

In contrast to this view, two recent decisions weighed the employer's interest against the employee's free speech interests, and found for the employer. These cases demonstrate that teachers cannot be assured of success in court when seeking relief on the ground that their First Amendment rights have been violated. In *Duke v. North Texas State University,* 469 F. 2d 829 (5th Cir. 1973), *cert. denied.* 37 L. Ed. 2d 160, a teaching assistant was not rehired because she used profane language in her criticism of the university and administration. The university charged that her language impaired her effectiveness as a teacher. The court of appeals found:

> As a past and prospective instructor, Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely . . . offensive remarks aimed at the administrators of the University. By her breach of duty, the interests of the University outweighed her claim for protection (469 F. 2d at 840).

The district court in *Tygrett v. Washington,* 346 F. Supp. 1247 (D.D.C. 1972), also found for the employer, the District of Columbia police force. Tygrett, a probationary officer, was dismissed after he announced that he would falsely call in sick and organize and lead a "sick-out" if certain personnel benefits were not implemented. In finding for the employer, the district court noted:

> The First Amendment Right of Free Speech, whether in the context of employment or any other legitimate activity, is not absolute. Frequently, the right to speak freely must be balanced against legitimate conflicting interests. *Pickering v. Board of Education,* 391 U.S. 563. (346 F. Supp. at 1250.)[34]

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[34] In *Pickering,* a teacher was dismissed by his school board because of his criticism of the board's activities. The Court, while finding for the teacher also noted that ". . . it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (391 U.S. at 568).

Policy Alternatives in Light of *Roth* and *Sindermann*

The Supreme Court decisions in *Roth* and *Sindermann* establish the "constitutional boundary lines around the territory covered by procedural due process."[35] If institutions work within the "boundary lines" marked by the decisions, they will find they have wide discretion in renewing the contracts of probationary teachers. On the other hand, probationary teachers examining the limits imposed by the Court's decisions will find that seeking relief through the courts is costly and yields uncertain results.

Because there is a surplus of qualified college teachers,[36] *Roth* and *Sindermann* come at a time when institutions desire great flexibility in hiring, retaining, and letting go faculty members. This situation is in marked contrast to the student boom and faculty shortage of the 1960s. Moreover, new concepts and needs in higher education require colleges and universities to maintain flexibility in their programs, where changes are being contemplated and initiated in areas such as curricula, organization, and time spent in obtaining a degree.

Under these circumstances, colleges and universities find that they want to maintain a balance between tenured and nontenured faculty that will provide flexibility as well as stability.[37] If the Court had held that the mere fact of contract nonrenewal required a statement of reasons and/or an institutional hearing, institutions might have been overburdened with the work required for processing a substantial number of nonrenewal cases. Institutions might then have been tempted to retain teachers simply to avoid the nonrenewal procedures, and as a consequence would have heavily tenured faculties with little flexibility. Such a situation might easily arise in an institution with a standard tenure policy of a seven-year probationary period after which the teacher must be granted tenure or let go, since the institution might find it difficult to offer satisfactory reasons for nonrenewal

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35 Rosenblum, Victor G., "Legal Dimensions of Tenure," in *Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education.* San Francisco: Jossey-Bass, 1973.

36 Furniss, Todd W. [Director, Office of Academic Affairs, American Council on Education], *Steady-State Staffing in Tenure-Granting Institutions and Related Papers.* Washington. D. C.: American Council on Education, 1973, p. 2.

37 *Ibid.*

after seven years of continuous employment. In light of *Roth* and *Sindermann,* however, colleges and universities are legally free to develop employment policies that will provide the faculty mix most favorable to their institutional goals.

As an alternative to tenure policies, colleges might consider the pure contract system of employment. The pure contract system has recently been implemented by the Virginia Community Colleges, which simultaneously abolished tenure for all faculty members who had not yet attained it.[38] The system's multiple contract plan—contracts of one, three, and five years' duration will be granted—does not contain any stated or implied promise of continuous employment beyond the term of a particular contract. The plan does, however, detail a procedure for appeal of a decision not to renew a contract. Institutions that adopt this system should not—in view of *Sindermann*—be found to have created an implied tenure-by-contract system.

In either a formal tenure or a contract system, the disadvantage at which probationary teachers may be placed under *Roth* and *Sindermann* is apparent from the reports of school boards' refusals to give reasons for nonrenewal,[39] and the tight job market that allows school boards to be selective in their hiring of nontenured teachers. However, there are pressures on universities not to adhere rigidly to the legal rights they have under the Court's decisions. First, the Court itself in *Roth* notes that its decision does not set university policy as to the "appropriate" action for a public institution to take in its treatment of employees (408 U.S. at 578).

Second, given this comment by the Court, it is important to note the already established practice at many universities to provide a statement of reasons in nonrenewal cases. An April 1972 survey[40] conducted by the American Council on Education's Higher Education Panel found that tenure systems are "nearly universal" in public and private universities and four-year colleges. It also reports that almost half of these institutions give written reasons for nonrenewal. The survey also found that about 90 percent of these institutions had procedures for appeal of denial of tenure or contract nonrenewal, but that

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[38] Memorandum from Chancellor Dana B. Hamel, Virginia Community Colleges to Presidents, Community College System, "Professional Employees Appointment Policy," September 20, 1972.

[39] See n. 21, *supra.*

[40] "Faculty Tenure and Contract Systems: Current Practice," in Furniss, *supra,* n. 36. See also Shulman, Carol H. *Collective Bargaining on Campus.* Washington, D. C.: ERIC Clearinghouse on Higher Education, 1972.

in only about 14 percent of these institutions had more than three appeals been taken during the preceding 30 months.

Third, it is likely that teachers—and perhaps their unions—will exert pressure to continue and extend the probationary teacher's opportunities for redress. William Van Alstyne has commented:

> The experience of the AAUP [American Association of University Professors] vividly demonstrates that . . . the lack of *any* intramural opportunity for hearing at all must ultimately undermine the untenured faculty member's constitutional freedom of speech and his academic freedom. Thus, we [AAUP] shall doubtless continue to stand by our own policy statement on this matter, whatever the prevailing fashion on the Court.[41]

The AAUP's position on this issue is, in fact, in opposition to the Court's rulings. But its position is apparently not out of the Court's favor, since the Court referred to AAUP in its comment that institutional policy need not be limited by the *Roth* decision (408 U.S. at 579, n. 17).

Current AAUP policy treats the question of nonrenewal under two separate headings: (1) cases in which the probationary teacher claims that his nonrenewal is based upon inadequate consideration of his qualifications; and (2) cases in which the probationary teacher charges that his nonrenewal resulted from considerations in violation of academic freedom or "governing policies on making appointments without prejudice with respect to race, sex, religion, or national origin."[42] In either situation, the AAUP advises that a teacher upon request should receive a written statement of reasons for nonrenewal. In the first situation, the teacher may present his claim charging inadequate consideration of his qualifications to a designated faculty committee that will determine whether the original decision is in accordance with institutional standards. The faculty body may recommend a reconsideration of the decision, but will not "substitute its judgment on the merits for that of the [responsible] faculty body."[43] In the second situation, informal settlement of the teacher's charge will be attempted. If this is unsuccessful, a hearing may be held at which the faculty member has the burden of proof. If he makes a *prima facie* case, then his supervisors must demonstrate the validity of their decision.[44]

A more ambitious plan for the protection of nontenured faculty

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41 Van Alstyne to author, *supra*, n. 26.

42 *AAUP Policy Documents and Reports*, *supra*, n. 5, at p. 19.

43 *Id.* at p. 16.

44 *Id.* at p. 19.

members comes in a draft statement from the National Education Association (NEA).[45] This statement differs from the AAUP position, in stipulating that the burden of proof for justifying nonrenewal rests with the institution rather than the teacher; that the teacher has the right to appeal the institution's decision to a third neutral party, e.g., the American Arbitration Association; and, most significantly, that

> the conferring of the initial annual contract upon a probationary employee does . . . carry with it an expectation of renewal so long as his work meets the predetermined standards of scholarship and teaching.[46]

Significantly, both the AAUP and the NEA serve as collective bargaining agents for colleges and universities. It is predictable that in their contract negotiations they will press for contractual guarantees to carry out their respective policy statements.

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[45] "Due Process and Tenure in Institutions of Higher Education," *Today's Education*, February 1973, p. 60.

[46] *Id.*, at p. 61.

Conclusion

The Supreme Court's decisions in *Roth* and *Sindermann* place conservative interpretations on the Fourteenth Amendment concepts of "liberty" and "property" that limit probationary teachers' opportunities for a statement of reasons and institutional due process hearings when their contracts are not renewed. Such teachers can, of course, resort to the courts, but success in court is unlikely if their institutions have acted knowledgeably in light of the Court's discussion of what will or will not constitute a violation of liberty or property interests.

In addition, in cases where nontenured teachers allege that nonretention was in retaliation for their exercise of First Amendment "liberty," institutions are not generally legally required to offer due process hearings under the *Roth* and *Sindermann* decisions. *Sindermann* does provide, however, that allegations of contract nonrenewal for exercise of free speech rights must be heard in court without summary judgment against the teacher (408 U.S. at 598). On the question of a property interest in continued employment, *Sindermann* holds that proof of an objective expectancy of de facto tenure entitles the teacher to an intramural hearing and a statement of reasons for contract nonrenewal (408 U.S. at 603).

The courts, therefore, are a nontenured teacher's first and last source of redress in most cases of violations of liberty and property interests and First Amendment rights. Commentators have questioned whether it is desirable for higher education to rely so heavily on the courts for adjudication of its disputes. The Commission on Academic Tenure in Higher Education (the "Keast" Commission) faults such dependence on the Courts, finding that it demonstrates an institution has not implemented satisfactory standards and procedures.[47] In addition

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[47] The "Keast" Commission, established in 1971, was sponsored by the Association of American Colleges and the American Association of University Professors, under a grant from the Ford Foundation. The commission examined the range of issues connected with tenure: current status, criticisms, alternatives, improvements. William R. Keast, chairman of the commission, is a professor of English and director, Center for Higher Education, University of Texas at Austin. The Commission's report is titled *Faculty Tenure*. San Francisco: Jossey-Bass, 1973.

> Frequent resort to court determination of personnel questions will surely erode institutional and faculty autonomy, thus jeopardizing the ability of faculties and institutions to govern themselves in the interest of their students and society generally.[48]

The Commission recommends that colleges and universities develop policies and procedures for handling faculty personnel problems that will "minimize reliance on the courts."[49]

Much of the effect of *Roth* and *Sindermann* may disappear as faculty collective bargaining units clarify in their contracts the rights of represented nontenured teachers to institutional hearings and statements of reasons in the event of contract nonrenewal. It remains to be seen, however, how the national pressures of the faculty labor market and the several professional faculty organizations in fact affect institutional policies and practices in the nonrenewal of faculty contracts.

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[48] *Id.*, at p. 33.

[49] *Ibid.*

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Appendix

In the pages that follow, page numbers from the official *United States Reports* are shown in brackets.

BOARD OF REGENTS OF STATE COLLEGES ET AL. *v.* ROTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-162. Argued January 18, 1972—Decided June 29, 1972

Respondent, hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave a nontenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal," but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. *Held:* The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of "liberty," and the terms of respondent's employment accorded him no "property" interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 569–579.

446 F. 2d 806, reversed and remanded.

Syllabus

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 603. DOUGLAS, J., filed a dissenting opinion, *post*, p. 579. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 604. MARSHALL, J., filed a dissenting opinion, *post*, p. 587. POWELL, J., took no part in the decision of the case.

Charles A. Bleck, Assistant Attorney General of Wisconsin, argued the cause for petitioners. With him on the brief were *Robert W. Warren*, Attorney General, and *Robert D. Martinson*, Assistant Attorney General.

Steven H. Steinglass argued the cause for respondent. With him on the brief were *Robert L. Reynolds, Jr.*, *Richard Perry*, and *Richard M. Klein*.

Briefs of *amici curiae* urging reversal were filed by *Robert H. Quinn*, Attorney General, *Walter H. Mayo III*, Assistant Attorney General, and *Morris M. Goldings* for the Commonwealth of Massachusetts; by *Evelle J. Younger*, Attorney General of California, *Elizabeth Palmer*, Acting Assistant Attorney General, and *Donald B. Day*, Deputy Attorney General, for the Board of Trustees of the California State Colleges; by *J. Lee Rankin* and *Stanley Buchsbaum* for the City of New York; and by *Albert E. Jenner, Jr.*, *Chester T. Kamin*, and *Richard T. Dunn* for the American Council on Education et al.

Briefs of *amici curiae* urging affirmance were filed by *David Rubin*, *Michael H. Gottesman*, *George H. Cohen*, and *Warren Burnett* for the National Education Association et al.; by *Herman I. Orentlicher* and *William W. Van Alstyne* for the American Association of University Professors; by *John Ligtenberg* and *Andrew J. Leahy* for the American Federation of Teachers; and by *Richard L. Cates* for the Wisconsin Education Association.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment.[2] There are no statu-

[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "*David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968*." The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

[2] Wis. Stat. § 37.31 (1) (1967), in force at the time, provided in pertinent part that:

"All teachers in any state university shall initially be employed

tory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures.[3] A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February first "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."[4]

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on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

[3] Wis. Stat. § 37.31 (1) further provided that:

"No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

[4] The Rules, promulgated by the Board of Regents in 1967, provide:

"RULE I—February first is established throughout the State University system as the deadline for written notification of non-tenured

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969–1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[5]

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faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."

"RULE II—During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

"RULE III—'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.

"RULE IV—When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

[5] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the pres-

Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F. Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F. 2d 806. We granted certiorari. 404 U. S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[6] We hold that he did not.

I

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right

ent case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate." 310 F. Supp. 972, 982.

[6] The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. *E. g., Orr* v. *Trinter,* 444 F. 2d 128 (CA6); *Jones* v. *Hopper,* 410 F. 2d 1323 (CA10); *Freeman* v. *Gould Special School District,* 405 F. 2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. *Drcwn* v. *Portsmouth School District,* 435 F. 2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an "expectancy" of continued employment. *Ferguson* v. *Thomas,* 430 F. 2d 852, 856 (CA5).

to some kind of prior hearing is paramount.[7] But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F. Supp., at 977–979. Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. And a weighing processs has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process.[8] But, to determine whether

[7] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U. S. 371, 379. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell* v. *Burson*, 402 U. S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e. g.*, *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Phillips* v. *Commissioner*, 283 U. S. 589, 597; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594.

[8] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, *supra*, at 378. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 263; *Hannah* v. *Larche*, 363 U. S. 420. The constitutional requirement

due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. See *Morrissey* v. *Brewer, ante,* p. 471, at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co.* v. *Tidewater Co.,* 337 U. S. 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[9] The Court has also made clear that the property interests protected by

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of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra.*

[9] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson,* 403 U. S. 365, 374. See, *e. g., Morrissey* v. *Brewer, ante,* p. 471, at 482; *Bell* v. *Burson,* 402 U. S., at 539; *Goldberg* v. *Kelly, supra,* at 262; *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6; *Pickering* v. *Board of Education,* 391 U. S. 563, 568; *Sherbert* v. *Verner,* 374 U. S. 398, 404.

procedural due process extend well beyond actual ownership of real estate, chattels, or money.[10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska,* 262 U. S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e. g., Bolling* v. *Sharpe,* 347 U. S. 497, 499–500; *Stanley* v. *Illinois,* 405 U. S. 645.

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[10] See, *e. g., Connell* v. *Higginbotham,* 403 U. S. 207, 208; *Bell* v. *Burson, supra; Goldberg* v. *Kelly, supra.*

[11] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharpe,* 347 U. S. 497, 499. See, *e. g., Stanley* v. *Illinois,* 405 U. S. 645.

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437. *Wieman* v. *Updegraff,* 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *United States* v. *Lovett,* 328 U. S. 303, 316–317; *Peters* v. *Hobby,* 349 U. S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would

[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax* v. *Raich,* 239 U. S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner* v. *Committee on Character,* 373 U. S. 96, 103. See *Cafeteria Workers* v. *McElroy, supra,* at 898. In the present case, however, this principle does not come into play.[13]

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that

[13] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guarantees. 446 F. 2d, at 809. But even assuming, *arguendo,* that such a "substantial adverse effect" under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232.

the decision not to rehire him was, in fact, based on his free speech activities.[14]

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers* v. *McElroy*, *supra*, at 895–896.

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[14] See n. 5, *supra*. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." 446 F. 2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid.*

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll* v. *Princess Anne*, 393 U. S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books* v. *Kansas*, 378 U. S. 205; *Marcus* v. *Search Warrant*, 367 U. S. 717. See *Freedman* v. *Maryland*, 380 U. S. 51; *Bantam Books* v. *Sullivan*, 372 U. S. 58. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U. S. 254.[15] See *Flemming* v. *Nestor*, 363 U. S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education*, 350 U. S. 551, and college professors and

[15] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." *Id.*, at 119. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.*, at 123.

staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff*, 344 U. S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higginbotham*, 403 U. S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public

[16] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment, see *Perry* v. *Sindermann, post,* at 602, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

colleges and universities.[17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the decision of this case.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see *post*, p. 603.]

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post*, p. 604.]

MR. JUSTICE DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University-Oshkosh—where during 1968–1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the

[17] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 AAUP Bulletin No. 1, p. 21 (Spring 1970).

black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann,* an action was started in Federal District Court under 42 U. S. C. § 1983 [1] claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F. Supp. 972, 983. The Court of Appeals affirmed. 446 F. 2d 806.

Professor Will Herberg, of Drew University, in writing of "academic freedom" recently said:

> "[I]t is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment.
>
> "But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional." Washington Sunday Star, Jan. 23, 1972, B–3, col. 1.

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[1] Section 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects "liberty" and "property" as stated by the Court in *Sindermann.*

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurter stated the constitutional theory in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 261–262 (concurring in result):

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered

as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

We repeated that warning in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603:

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* While discharges of employees for "cause" are permissible (*Fibreboard Corp.* v. *NLRB,* 379 U. S. 203, 217), discharges because of an employee's union activities are banned by § 8 (a)(3), 29 U. S. C. § 158 (a)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See *J. P. Stevens & Co.* v. *NLRB,* 380 F. 2d 292, 300.

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the *Sweezy* case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the *Keyishian* case, one of the petitioners (Keyishian himself) had only a "one-year-term contract" that was not renewed. 385 U. S., at 592. In *Shelton* v. *Tucker,* 364 U. S. 479, one of the petitioners was

a teacher whose "contract for the ensuing school year was not renewed" (*id.*, at 483) and two others who refused to comply were advised that it made "impossible their re-employment as teachers for the following school year." *Id.*, at 484. The oath required in *Keyishian* and the affidavit listing memberships required in *Shelton* were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school system, as we noted in *Pickering* v. *Board of Education*, 391 U. S. 563, 569. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, *e. g.*, *Graham* v. *Richardson*, 403 U. S. 365, 374. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). In *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, [illegible], we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In *Wieman* v. *Updegraff*, 344 U. S. 183, we held that an applicant could not be denied the opportunity

for public employment because he had exercised his First Amendment rights. And in *Speiser* v. *Randall,* 357 U. S. 513, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgment of Fourteenth Amendment rights.

As we held in *Speiser* v. *Randall, supra,* when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. "[T]he 'protection of the individual against arbitrary action' . . . [is] the very essence of due process," *Slochower* v. *Board of Education,* 350 U. S. 551, 559 (1956), but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such "arbitrary action."

Moreover, where "important interests" of the citizen are implicated (*Bell* v. *Burson,* 402 U. S. 535, 539) they are not to be denied or taken away without due process. *Id.,* at 539. *Bell* v. *Burson* involved a driver's license. But also included are disqualification for unemployment compensation (*Sherbert* v. *Verner,* 374 U. S. 398), discharge from public employment (*Slochower v. Board of Education, supra*), denial of tax exemption (*Speiser* v. *Randall, supra*), and withdrawal of welfare benefits (*Goldberg* v. *Kelly,* 397 U. S. 254). And see *Wisconsin* v. *Constantineau,* 400 U. S. 433. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria Workers v. *McElroy,* 367 U. S. 886, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior

to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons—both of which were refused by petitioners—there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F. Supp., at 979–980:

> "Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless wi[illegible] procedural safeguards. I hold that minimal pr[illegible]al due process includes a statement of the rea[illegible] why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed

> time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact."

It was that procedure that the Court of Appeals approved. 446 F. 2d, at 809–810. The Court of Appeals also concluded that though the § 1983 action was pending in court, the court should stay its hand until the academic procedures had been completed.[2] As stated by the Court of Appeals in *Sindermann* v. *Perry*, 430 F. 2d 939 (CA5):

> "School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination." *Id.*, at 944–945.

That is a permissible course for district courts to take, though it does not relieve them of the final determination

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[2] Such a procedure would not be contrary to the well-settled rule that § 1983 actions do not require exhaustion of other remedies. See, *e. g.*, *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Damico* v. *California*, 389 U. S. 416 (1967); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Monroe* v. *Pape*, 365 U. S. 167 (1961). One of the allegations in the complaint was that respondent was denied any effective state remedy, and the District Court's staying its hand thus furthered rather than thwarted the purposes of § 1983.

whether nonrenewal of the teacher's contract was in retaliation of the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968–1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case, he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[1] This claim was sustained by the District Court, which granted respondent summary judgment, 310 F. Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F. 2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a prop-

[1] Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

erty interest, I would go further than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling—*i. e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory [2] or contractual [3] controls, a government employer is different. The government may only act fairly and reasonably.

This Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) (Hughes, J.). See also *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." *Truax* v. *Raich*, *supra*, at 38.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—

[2] See, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); 42 U. S. C. § 2000e.

[3] Cf. Note, Procedural "Due Process" in Union Disciplinary Proceedings, 57 Yale L. J. 1302 (1948).

liberty to work—which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, *e. g., Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 185 (1951) (Jackson, J., concurring); *United States* v. *Lovett,* 328 U. S. 303, 316–317 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

MR. JUSTICE DOUGLAS has written that

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 179 (concurring opinion).

And Mr. Justice Frankfurter has said that "[t]he history of American freedom is, in no small measure, the

history of procedure." *Malinski* v. *New York*, 324 U. S. 401, 414 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that "[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby* v. *Allen*, 326 F. 2d 605, 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Bell* v. *Burson*, 402 U. S. 535 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons and a chance for a hearing on disputed issues of fact; [4] that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing; [5] that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing; [6] and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute.[7] I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons and given an opportunity to respond.

[4] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926).
[5] *Slochower* v. *Board of Education*, 350 U. S. 551 (1956).
[6] *Willner* v. *Committee on Character*, 373 U. S. 96 (1963).
[7] *Connell* v. *Higginbotham*, 403 U. S. 207 (1971).

It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. *Goldberg* v. *Kelly, supra.* The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits

from occurring." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 366 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

> "In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice JACKSON in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice'—blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . ." Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law 70, 73 (1961).

Accordingly, I dissent.

Syllabus

PERRY ET AL. *v.* SINDERMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–36. Argued January 18, 1972—Decided June 29, 1972

Respondent was employed in a state college system for 10 years, the last four as a junior college professor under a series of one-year written contracts. The Regents then declined to renew his employment for the next year, without giving him an explanation or prior hearing. Respondent then brought this action in the District Court, alleging that the decision not to rehire him was based on respondent's public criticism of the college administration and thus infringed his free speech right, and that the Regents' failure to afford him a hearing violated his procedural due process right. The District Court granted summary judgment for petitioners, concluding that respondent's contract had terminated and the junior college had not adopted the tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of respondent's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech, and that if respondent could show that he had an "expectancy" of re-employment, the failure to allow him an opportunity for a hearing would violate the procedural due process guarantee. *Held:*

1. Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Pp. 596–598.

2. Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Pp. 599–603.

430 F. 2d 939, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 603. BRENNAN, J., filed an opinion dissenting in part, in which DOUGLAS, J., joined, *post*, p. 604. MARSHALL, J., filed an opinion dissenting in part, *post*, p. 605. POWELL, J., took no part in the decision of the case.

W. O. Shafer argued the cause for petitioners. With him on the brief was *Lucius D. Bunton*.

Michael H. Gottesman argued the cause for respondent. With him on the brief were *George H. Cohen* and *Warren Burnett*.

Briefs of *amici curiae* urging affirmance were filed by *David Rubin* and *Richard J. Medalie* for the National Education Association; by *John Ligtenberg* and *Andrew J. Leahy* for the American Federation of Teachers; and by *Herman I. Orentlicher* and *William W. Van Alstyne* for the American Association of University Professors.

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legis-

lature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in Federal District Court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners—members of the Board of Regents and the president of the college—denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three

[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

brief affidavits filed by the respondent,[3] the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system."[4]

The Court of Appeals reversed the judgment of the District Court. 430 F. 2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.*, at 942–943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943–944. We granted a writ of certiorari, 403 U. S. 917, and we have considered this case along with *Board of Regents* v. *Roth, ante,* p. 564.

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

[3] The petitioners, for whom summary judgment was granted, submitted no affidavits whatever. The respondent's affidavits were very short and essentially repeated the general allegations of his complaint.

[4] The findings and conclusions of the District Court—only several lines long—are not officially reported.

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall, supra*, unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404–405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Torcaso* v. *Watkins*, 367 U. S. 488, 495–496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 11, 17; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education, supra*, with *Shelton* v. *Tucker, supra*.

Thus, the respondent's lack of a contractual or tenure

"right" to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker, supra; Keyishian* v. *Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." 430 F. 2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering* v. *Board of Education, supra.*

For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior College, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents* v. *Roth, ante,* p. 564, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth,* the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[5] Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administra-

[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. 430 F. 2d, at 944. We have rejected this approach in *Board of Regents* v. *Roth, ante,* p. 564, at 575 n. 14.

tion. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[6]

[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period

Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth*, *supra*, at 571–572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed

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of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).

. . . . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

a process by which agreements, though not formalized in writing, may be "implied." 3 A. Corbin on Contracts §§ 561–572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, Tenure in American Higher Education 17–28 (1959).[7]

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "suf-

[7] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, *supra*, at 577. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

ficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this case to the District Court is

Affirmed.

MR. JUSTICE POWELL took no part in the decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.*

I concur in the Court's judgments and opinions in *Perry* and *Roth*, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause

*This opinion applies also to No. 71-162, *Board of Regents of State Colleges et al.* v. *Roth*, *ante*, p. 564.

for nonrenewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply:

> "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth, ante,* at 577.

Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting in No. 71–162 and dissenting in part in No. 70–36.

Although I agree with Part I of the Court's opinion in No. 70–36, I also agree with my Brother MARSHALL that "respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." *Ante,* at 590. Since respondents were entitled to summary judgment on that issue, I would affirm the judgment of the Court of Appeals in No. 71–162, and, to the extent indicated by my Brother MARSHALL, I would modify the judgment of the Court of Appeals in No. 70–36.

MR. JUSTICE MARSHALL, dissenting in part.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in Federal District Court claiming that the decision not to rehire him was in retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in *Board of Regents* v. *Roth,* No. 71–162, *ante,* p. 587, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.